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UNCLAS SECTION 01 OF 02 ANKARA 004786

SIPDIS

EXIM FOR PAMELA ROSS AND MARGARET KOSTIC
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SENSITIVE

E.O. 12958: N/A

TAGS: [ENRG](#) [EINV](#) [BEXP](#) [TU](#) [EXIM](#) [OPIC](#)

SUBJECT: COURT RULING THREATENS TO SUSPEND TURKISH POWER
PLANT OPERATIONS

Sensitive But Unclassified. Please handle accordingly.

1. (SBU) Summary: In a surprise ruling in late July, the Council of State (Danistay) issued a suspension ruling for the Electricity Sales Agreement of Enka's Izmir power plant. Enka is optimistic that the court ruling will be overturned, given the power plant's significant share in Turkey's electricity generation, as well as the price and purchase guarantees in its contract. In addition to the minor share U.S. Intergeren has in the Enka power plant, OPIC and EXIM have credit exposure related to the three Enka "BO" plants. Although likely to be resolved, this problem sends another negative message to potential foreign investors that rules are subject to arbitrary risk in the Turkish market. End Summary.

2. (SBU) The Public Management Development Center (KIGEM), run by long time anti-privatization gadfly Mumtaz Sosyal, filed a lawsuit against the State Electricity Trading Company (TETAS) regarding the Electricity Sales Agreement (ESA) of Enka's Izmir power plant signed in 1998, on the grounds that this ESA qualifies as a concession contract and should be reviewed by Danistay. After several years of dismissal and reversals by various administrative courts, the case made its way to Danistay, which ruled on July 10 that the implementation of the ESA be suspended until Danistay reviews the agreement. In principle, the power plant would have to suspend its operations if TETAS is unable to overturn the Danistay ruling in time. The Izmir plant, like two other natural gas fired Enka plants in Gebze and Adapazari, was established on a Build-Operate (BO) basis.

3. (SBU) The three power plants, which account for 20 percent of Turkey's total generation capacity, have been model projects for the GOT, due to their stable generation practices and low prices-- unlike the higher-priced Build-Operate-Transfer (BOT) plants, which have been on the GOT's black list for years. U.S. Intergeren currently has a 10 percent share in the three Enka power plants, but is planning to sell its remaining share to Enka by the end of 2005. OPIC and EXIM exposure in the power plants will likely continue after Intergeren's withdrawal. KIGEM filed similar lawsuits against other four other BO projects in Turkey, so the Izmir case could form a problematic precedent if the Danistay overturns the Izmir plant's agreement.

4. (SBU) Enka believes it is well protected by its contract with the GOT, which includes price and purchase guarantees. Relevant GOT agencies (Turkish Pipelines Company BOTAS and the Treasury) submitted opinions supporting TETAS' objection to the Danistay ruling. Enka officials told us TETAS would not be able to replace the electricity it buys from Enka's plant if the suspension were to be implemented, putting Izmir at risk of black-outs. BOTAS is the sole take or pay supplier of the Enka plant and it has related international liabilities to its gas suppliers. The Treasury is bound by a "take or pay" clause in the agreement, and would have to pay for the electricity the plant could generate, even if the ruling would suspend the plant's operations. Given the united support by all related GOT agencies, both Enka officials and Embassy contacts are optimistic that the Danistay ruling can be overturned (or ignored). According to the ruling, TETAS would have to implement the suspension by August 22, if it fails to overturn it by that time. Embassy contacts believe a likely Council of Minister ruling could permit the Izmir Plant to continue its operations "for public benefit," thereby annulling the Danistay ruling.

4. (SBU) COMMENT: WE ARE OPTIMISTIC THAT ENKA PLANTS' OPERATIONS IN TURKEY WILL CONTINUE WITHOUT INTERRUPTION, GIVEN THE UNUSUAL SHOW OF UNITY OF GOT AGENCIES IN SUPPORT OF THESE FACILITIES AND RECOGNITION OF TURKEY'S DEPENDENCE ON THESE AND OTHER BO'S FOR CRITICAL ELECTRICITY SUPPLY. HOWEVER, THE DANISTAY RULING SENDS YET ANOTHER NEGATIVE MESSAGE TO POTENTIAL INVESTORS IN TURKEY: BEWARE LEGAL RISKS, UNCERTAINTIES AND UNFORESEEN CHALLENGES OR CHANGES IN THE RULES. WHILE THE GOT HAS APPLIED PRESSURE ON HIGHER

PRICED BUILD-OPERATE-TRANSFER (BOT) PROJECTS, THEY CONTINUE
TO PURCHASE THEIR ELECTRICITY OUTPUT PER GUARANTEED
CONTRACTS.

McEldowney